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19 and the Putative Class

20 **UNITED STATES DISTRICT COURT**
21 **CENTRAL DISTRICT OF CALIFORNIA**

22 LEMMO'S PIZZERIA, LLC,
23 individually, and on behalf of all
24 others similarly situated,

25 Plaintiff,

26 vs.

27 DISCOVER FINANCIAL SERVICES,
28 DFS SERVICES, LLC, DISCOVER
BANK, and DOES 1-100,
Defendants.

CASE NO.: 2:23-cv-06651

CLASS ACTION

COMPLAINT FOR

(1) Breach of Contract, Including the
Implied Covenant of Good Faith and
Fair Dealing;
(2) Unjust Enrichment; and
(3) Violation of Cal. Bus. & Prof. Code
§17200, *et seq.*

DEMAND FOR JURY TRIAL

1 Plaintiff Lemmo's Pizzeria, LLC ("Plaintiff"), by and through its attorneys,
2 hereby brings this class and representative action against Discover Financial
3 Services, DFS Services, LLC, Discover Bank, and DOES 1 through 100 (collectively
4 "Discover" or "Defendants").

5 NATURE OF THE ACTION

6 1. The allegations herein are based upon public information, investigation
7 of counsel, and information and belief, except those allegations which pertain to
8 Plaintiff's conduct which allegations are based on personal knowledge.

9 2. This is a class and representative action brought by Plaintiff to assert
10 claims in its own right, and in its capacity as the class representative of all other
11 persons and entities similarly situated.

12 3. Discover charged Plaintiff and the other members of the Class (defined
13 below) inflated Interchange Fees by systematically and knowingly misclassifying
14 certain Discover credit cards into the incorrect, higher Interchange Rate category.
15 This directly harmed Plaintiff and the Class in the form of Interchange Fee
16 overcharges and directly unjustly benefited Discover in the form of inflated,
17 improper Interchange Fee revenue.

18 4. This class action seeks monetary damages, restitution, specific
19 performance, and injunctive relief to stop and correct the misconduct by Discover
20 that is alleged herein. This conduct has the overwhelming common denominator of
21 misclassifying card transactions in order to collect additional fee revenue that would
22 not have been obtained absent the misclassification.

23 PARTIES

24 5. Plaintiff Lemmo's Pizzeria, LLC is a Limited Liability Company with
25 its principal place of business at 4223 Tierra Rejada Rd, Moorpark, California 93021.
26 Plaintiff is a resident of California. Plaintiff has accepted Discover cards from its
27 customers since at least September 26, 2019 and paid inflated Interchange Fees to
28 Discover as a result of Discover's misconduct alleged herein.

1 6. Defendant Discover Financial Services is a Delaware corporation with
2 headquarters in Riverwood, Illinois. Discover Financial Services is the parent
3 company of subsidiaries including Defendants DFS Services LLC and Discover
4 Bank.

5 7. Defendant DFS Services LLC is a Delaware Limited Liability Company
6 with headquarters in Riverwood, Illinois. On information and belief, DFS Services
7 LLC operates the Discover network, which processes Discover credit card
8 transactions, including by assigning an Interchange Fee to such transactions. DFS
9 Services LLC is the servicing agent of Discover Bank, and one of the world's largest
10 payment networks.

11 8. Defendant Discover Bank is a federally insured online bank chartered
12 and incorporated in Delaware, with headquarters in Riverwood, Illinois. On
13 information and belief, Discover Bank acts as the Issuing Bank for transactions that
14 take place on the Discover card network. Discover Bank issues and services Discover
15 credit card accounts.

16 9. Without limitation, defendants DOES 1 through 100 include agents,
17 partners, joint ventures, subsidiaries and/or affiliates of Discover. As used herein,
18 where appropriate, the term "Discover" is also inclusive of Defendants DOES 1
19 through 100.

20 10. Plaintiff is unaware of the true names of defendants DOES 1 through
21 100. Defendants DOES 1 through 100 are thus sued by fictitious names, and the
22 pleadings will be amended as necessary to obtain relief against defendants DOES 1
23 through 100 when the true names are ascertained, or as permitted by law or by the
24 Court.

25 11. There exists, and at all times herein mentioned existed, a unity of interest
26 and ownership between the named defendants (including DOES) such that any
27 corporate individuality and separateness between the named defendants has ceased,
28 and that the named defendants are *alter egos* in that the named defendants effectively

1 operate as a single enterprise, or are mere instrumentalities of one another.

2 12. At all material times herein, each defendant was the agent, servant, co-
3 conspirator and/or employer of each of the remaining defendants, acted within the
4 purpose, scope, and course of said agency, service, conspiracy and/or employment
5 and with the express and/or implied knowledge, permission, and consent of the
6 remaining defendants, and ratified and approved the acts of the other defendants.
7 However, each of these allegations are deemed alternative theories whenever not
8 doing so would result in a contradiction with the other allegations.

9 13. Whenever reference is made in this Complaint to any act, deed, or
10 conduct of Defendants, the allegation means that Defendants engaged in the act,
11 deed, or conduct by or through one or more of their officers, directors, agents,
12 employees, or representatives actively engaged in the management, direction,
13 control, or transaction of Defendants' ordinary business and affairs.

14 14. As to the conduct alleged herein, each act was authorized, ratified or
15 directed by Defendants' officers, directors, or managing agents.

16 **VENUE AND JURISDICTION**

17 15. This Court has subject matter jurisdiction of this action pursuant to the
18 Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §§ 1332(d)(2) and (6)
19 because: (i) there are 100 or more Class members; (ii) there is an aggregate amount
20 in controversy exceeding \$5,000,000.00 exclusive of interest and costs; and (iii)
21 there is minimal diversity; Plaintiff and the Defendants are citizens of different states.

22 16. This Court has personal jurisdiction over Defendants because
23 Defendants have sufficient minimum contacts in California, and otherwise
24 intentionally avail themselves of the markets within California through their business
25 activities, and directly profit from their activities in California, such that the exercise
26 of jurisdiction by this Court is proper and necessary. Moreover, this Court has
27 specific personal jurisdiction over Defendants because, *inter alia*: through their
28 conduct alleged herein, Defendants engaged in misconduct in California and directed

1 at California, and availed themselves of the privileges of conducting activities in
 2 California; the claims of Plaintiff and the California-based Class members in this case
 3 arise out of and directly relate to the Defendants' contacts with, and conduct
 4 conducted in and directed at, California; the exercise of jurisdiction over Defendants
 5 in California would be fair and reasonable; this Court and California have a very
 6 strong interest in adjudicating the matter; this forum would permit the efficient
 7 resolution of this lawsuit; and this forum is convenient to Plaintiff and the Class and
 8 would not be unreasonably burdensome to Defendants.

9 17. Venue is proper in this District, *inter alia*, pursuant to 28 U.S.C. §
 10 1391(b)(2) because Discover conducts substantial business in this District; and
 11 because Plaintiff is located in this District and incurred and paid improper
 12 Interchange Fee overcharges in this District.

13 **FACTUAL ALLEGATIONS**

14 18. Throughout the Class Period, Discover systematically misclassified
 15 certain credit cards used in transactions, resulting in the charging of Interchange Fees
 16 that were higher than appropriate and higher than Discover promised and was
 17 contractually permitted to assess. This misclassification scheme involved the
 18 misrepresentation to merchants like Plaintiff, card processors, acquirers, and the
 19 general public that certain card transactions fell into higher pricing tier categories
 20 than they actually did.

21 **I. The Mechanics of Credit Card Processing.**

22 19. There are several components/parties involved with respect to credit
 23 card transactions: (1) The cardholder who makes the purchase, (2) the merchant such
 24 as Plaintiff, (3) the acquiring bank or "acquirer," which is an intermediary that pays
 25 the transaction funds to the merchant, (4) the card processor, which works with the
 26 acquirer to process card transactions, (5) the cardholder's issuing bank, which issues
 27 the credit card, and (6) the card network.

28 20. When a Discover cardholder uses their Discover card to execute a

1 transaction, the merchant is not paid immediately. Instead, the merchant processes
2 the transaction and submits it to the processor. The processor, in turn, submits the
3 transaction to the card network.

4 21. Discover is unique among the major providers of credit cards in that it
5 issues its cards directly to consumers, as opposed to issuing them through third party
6 banks. In terms of the parties identified above, Discover therefore functions as both
7 the issuing bank and the card network in any given Discover card transaction.

8 22. The card network then processes the transaction, including assigning an
9 Interchange Fee for the transaction, which is based primarily on the applicable
10 Interchange Rate, expressed as a percentage of the transaction amount. For example,
11 if the applicable Interchange Rate for a transaction is 1.80%, the Interchange Fee for
12 that transaction may be calculated as 1.80% of the transaction amount plus a flat fee
13 of \$0.10. For Discover card transactions, Discover assigns an Interchange Rate, and
14 calculates the Interchange Fee, for the transaction systematically using an internal
15 automated system.

16 23. The issuing bank then charges the full amount of the transaction to the
17 customer/cardholder's account.

18 24. Subsequently, the issuing bank sends the amount of the transaction less
19 the Interchange Fee to the acquirer. For most merchants, including Plaintiff, the
20 acquirer and/or processor passes the Interchange Fee on to the merchant directly in
21 the form of a reduced payment to the merchant on the transaction. For some
22 merchants, the acquirer and/or processor charges the merchant indirectly for the
23 Interchange Fee, also resulting in reduced payment to the merchant on the
24 transaction.

25 25. Finally, the processor deducts its own fee ("markup") and the acquirer
26 may deduct its own fee ("assessment") from the amount received from the issuing
27 bank. The processor then deposits the remaining balance of the transaction into the
28 merchant's account.

26. Thus, on a given Discover card transaction, the merchant ultimately receives the amount of the transaction less (1) the Interchange Fee, which is retained by Discover, (2) the processor's markup, and (3) the acquirer's assessment, if any.

II. Discover's Interchange Rate Sheet.

27. The Interchange Fee that the card network applies to a given transaction is determined based on certain factors, including the processing method (*e.g.*, whether the card is present or not present), the merchant category, and the card category.

28. Discover maintains and publishes an Interchange Rate Sheet, which sets forth particular Interchange Rates to card transactions based on the category into which the card falls. For instance, in the below Interchange Rate Sheet, a card categorized as "Discover Consumer Credit" will be assigned an Interchange Rate of 1.56% of the transaction plus a \$0.10 flat fee if the card is present during the transaction. A card categorized, instead, as "Discover Commercial Credit" will be assigned an Interchange Fee of "2.30% + \$0.10" assuming the card is present.

Discover Credit Card Rates

CARD PRESENT - DISCOVER CREDIT	INTERCHANGE RATE
Discover Consumer Credit	1.56% + \$0.10
Discover Rewards Credit	1.71% + \$0.10
Discover Premium Credit	1.71% + \$0.10
Discover Premium Plus Credit	2.15% + \$0.10
Discover Commercial Credit	2.30% + \$0.10
KEYED - DISCOVER CREDIT	INTERCHANGE RATE

CARD PRESENT - DISCOVER CREDIT	INTERCHANGE RATE
Discover Consumer Credit	1.87% + \$0.10
Discover Rewards Credit	1.97% + \$0.10
Discover Premium Credit	2.00% + \$0.10
Discover Premium Plus Credit	2.40% + \$0.10
Discover Commercial Credit	2.30% + \$0.10

29. Discover's published Interchange Rate Sheet created and constituted a binding contractual obligation and promise by Discover accepted by Plaintiff and the Class, or alternatively created a quasi-contractual obligation by Discover to Plaintiff and the Class, to assign and charge Interchange Rates and Interchange Fees in accordance with the rates and criteria specified in the Interchange Rate Sheet.

30. Throughout the Class Period, the Interchange Rates applicable to Discover *consumer* cards were generally lower than the Interchange Rates applicable to Discover *commercial* cards.

31. Discover assigns the card category for Discover card transactions. Merchants, including Plaintiff and the Class, lack sufficient information to discern whether Discover has properly classified cards for their transactions, and they could not reasonably know or detect Discover's misclassification scheme alleged herein.

III. Discover Systematically Misclassified Card Categories for Certain Discover Card Transactions.

32. In direct breach of its promise and obligation to Plaintiff and the Class, since at least 2008 (if not longer), Discover has systematically and knowingly applied Interchange Rates and Interchange Fees to Discover card transactions accepted by Plaintiff and the Class, that were higher than the rates and fees specified in Discover's Interchange Rate Sheet. This directly harmed Plaintiff and the Class in the form of

1 Interchange Fee overcharges and directly unjustly benefited Discover in the form of
2 inflated, improper Interchange Fee revenue. Discover did this by knowingly and
3 systematically mischaracterizing the card type/category for certain card transactions.
4 Since at least 2008, Discover has systematically and knowingly applied the higher
5 Interchange Rates and Internchange Fees applicable to Commercial Discover card
6 transactions, to certain transactions that did not involve Commercial cards and
7 instead should have been subject to lower Interchange Rates and Interchange Fees.

8 33. By way of example only, on information and belief, Discover's practice
9 throughout the Class Period was to misclassify Consumer credit cards as Commercial
10 cards for purposes of assigning artificially higher Interchange Rates and Interchange
11 Fees, if the cardholder using the Consumer credit card also maintained a Commercial
12 account with Discover. Thus, even though Discover knew, and its systems reflected,
13 that the cardholder used a Consumer credit card for a transaction, Discover
14 nevertheless misclassified the card used as a Commercial card, misrepresented that
15 the at-issue transaction involved a Commercial card, and improperly assigned the
16 transaction a higher-than-applicable Interchange Rate and Interchange Fee associated
17 with Commercial card transactions. This practice resulted in higher Interchange Fees
18 being paid by Plaintiff and the other merchants in the Class, and thus resulted in
19 Plaintiff and the Class receiving a smaller portion of the transaction amount than they
20 should have received and would have received but for Discover's misconduct and
21 breach. This practice unjustly benefited Discover in the form of improper, inflated
22 Interchange Fee revenues.

23 34. At all relevant times, Plaintiff was charged fees on each Discover card
24 transaction processed by Plaintiff, including the Interchange Fee assigned by
25 Discover.

26 35. Plaintiff and the Class incurred overcharges and were deprived of
27 portions of transaction amounts, that they should have received, as a result of
28 Discover's misclassification conduct alleged herein. Plaintiff had multiple Discover

1 card transactions misclassified by Discover, resulting in multiple overcharges and
2 instances where Plaintiff was deprived of portions of transaction amounts Plaintiff
3 should have received.

4 36. On information and belief, Discover has been aware of this
5 misclassification issue, and of the resulting overcharges to Plaintiff and the Class,
6 since 2008 or at least for many years, but Discover has nevertheless made the
7 conscious choice to not fix this issue or to provide any retroactive remediation, to
8 date, to Plaintiff and the Class for same.

9 37. On information and belief, Discover's internal database(s) include, for
10 the Class Period, the information necessary to identify: (a) all instances in which
11 Discover's card misclassifications and the corresponding resulting overcharges to
12 Plaintiff and the Class occurred; and (b) the dollar amounts of the resulting
13 overcharges.

14 **IV. The Delayed Discovery Doctrine Applies.**

15 38. Plaintiff and the Class did not discover, and could not reasonably have
16 discovered, their causes of action against Discover until, at the earliest, Discover
17 disclosed its misclassification scheme in regulatory filings that became publicly
18 available on July 19, 2023. (See Discover Financial Services Form 8-K, available at
19 [https://d18rn0p25nwr6d.cloudfront.net/CIK-0001393612/a4db3f93-d8e8-44b2-](https://d18rn0p25nwr6d.cloudfront.net/CIK-0001393612/a4db3f93-d8e8-44b2-a895-03b271e7be60.pdf)
20 [a895-03b271e7be60.pdf](https://d18rn0p25nwr6d.cloudfront.net/CIK-0001393612/a4db3f93-d8e8-44b2-a895-03b271e7be60.pdf) (last accessed on August 11, 2023.))

21 39. Plaintiff and the Class could not previously have discovered their causes
22 of action, *inter alia*, because they lacked access to Discover's internal data that shows
23 the true Interchange Rate categories for which the transactions in question qualified
24 and which should have applied, and the periodic statements that they received did not
25 provide sufficient information from which they could have reasonably discerned or
26 discovered Discover's misconduct alleged herein. Plaintiff and the Class had no
27 reasonable means of detecting Discover's misclassification scheme for the additional
28 reason that they reasonably expected that Discover would honestly and accurately

1 represent the true Interchange Rate category of Discover credit cards when
2 processing transactions.

3 40. Moreover, Discover knew about, and until July 19, 2023 fraudulently
4 concealed from Plaintiff, Class, and the public, its misclassification scheme and the
5 resulting overcharges to Plaintiff and the Class.

6 41. In light of the foregoing, the applicable statute of limitations period(s)
7 did not begin to run until July 19, 2023.

8 **CLASS ACTION ALLEGATIONS**

9 42. The preceding allegations are incorporated by reference and re-alleged
10 as if fully set forth herein.

11 43. Plaintiff brings this case as a class action pursuant to Federal Rules of
12 Civil Procedure 23(a)(b)(1), (b)(2) and (b)(3) on behalf of the following Class and
13 California Subclass:

14 a. “Class”: All merchants who, at any time from 2008 to the present,
15 accepted Discover credit cards and were charged Interchange Fees for one or more
16 transaction(s) that were higher than the Interchange Fees applicable to such
17 transaction(s) under Discover’s contemporaneous Interchange Rate Sheet.

18 b. “California Subclass”: All merchants within California who, at any time
19 from 2008 to the present, accepted Discover credit cards and were charged
20 Interchange Fees for one or more transaction(s) that were higher than the Interchange
21 Fees applicable to such transaction(s) under Discover’s contemporaneous
22 Interchange Rate Sheet.

23 44. Excluded from the Class and California Subclass are: (1) any entity in
24 which Defendants (or any of them) have a controlling interest; (2) officers or
25 directors of Defendants; (3) this Court and any of its employees assigned to work on
26 the case; and (4) all employees of the law firms representing Plaintiff and the Class.

27 45. This action has been brought and may be properly maintained on behalf
28 of each member of the Class and California Subclass pursuant to Federal Rule of

1 Civil Procedure 23.

2 46. **Numerosity** – The members of the Class and California Subclass are so
3 numerous that a joinder of all members would be impracticable. While the exact
4 numbers of Class and California Subclass members are presently unknown to
5 Plaintiff, and can only be determined through appropriate discovery, Plaintiff
6 believes that the Class and California Subclass are each likely to include at least
7 thousands of members, including based on the fact that Discover is one of the largest
8 card issuers in the United States and is widely accepted by merchants throughout the
9 Untited States and in California.

10 47. Upon information and belief, Discover’s database(s) and/or other
11 available records include the information needed to identify each member of the
12 Class and California Subclass.

13 48. **Commonality** – This action involves common questions of law and
14 fact. The questions of law and fact common to both Plaintiff and the Class Members
15 include, but are not limited to, the following:

16 a. Whether Discover’s Interchange Rate Sheet constituted or created a
17 binding contractual obligation to Plaintiff and the Class to assess Interchange Rates
18 and Interchange Fees in accordance with the terms thereof;

19 b. Whether, alternatively, Discover had a quasi-contractual obligation to
20 Plaintiff and the Class to assess Interchange Rates and Interchange Fees in
21 accordance with the terms of its Interchange Rate Sheet;

22 c. Whether Discover breached its obligation to Plaintiff and the Class by
23 assigning and charging Interchange Rates and Interchange Fees that were higher than
24 those specified in Discover’s Interchange Rate Sheet;

25 d. Whether Discover has been unjustly enriched by its conduct alleged
26 herein; and

27 e. Whether Discover has engaged in unfair, unlawful, and/or fraudulent
28 conduct in violation of Cal. Bus. & Prof. Code § 17200 *et seq.* by its conduct alleged

1 herein (California Subclass).

2 49. **Typicality** – Plaintiff’s claims are typical of all of the members of the
3 Class and California Subclass. Plaintiff and the other members of the Class and
4 California Subclass were subject to the same alleged misclassification conduct by
5 Discover and their claims arise under the same legal theories. Plaintiff, like the other
6 members of the Class and California Subclass, has sustained damages arising from
7 Discover’s alleged violations of the laws, as alleged herein.

8 50. **Adequacy** – Plaintiff will fairly and adequately protect the interests of
9 the Class and California Subclass members. Plaintiff has retained competent counsel
10 experienced in class action litigation to ensure such protection. There are no material
11 conflicts between the claims of Plaintiff and the members of the Class and California
12 Subclass that would make class certification inappropriate. Plaintiff and its counsel
13 intend to prosecute this action vigorously.

14 51. **Predominance and Superiority** – The matter is properly maintained as
15 a class action under Federal Rule of Civil Procedure 23(b)(3) because the common
16 questions of law or fact identified herein and to be identified through discovery
17 predominate over questions that may affect only individual Class members. Further,
18 the class action is superior to all other available methods for the fair and efficient
19 adjudication of this matter. Because the injuries suffered by the individual Class
20 members are relatively small, the expense and burden of individual litigation would
21 make it virtually impossible for Plaintiff and Class members to individually seek
22 redress for Discover’s wrongful conduct. Even if any individual person or group(s)
23 of Class members could afford individual litigation, it would be unduly burdensome
24 to the courts in which the individual litigation would proceed. The class action device
25 is preferable to individual litigation because it provides the benefits of unitary
26 adjudication, economies of scale, and comprehensive adjudication by a single court.
27 In contrast, the prosecution of separate actions by individual Class members would
28 create a risk of inconsistent or varying adjudications with respect to individual Class

1 members that would establish incompatible standards of conduct for the party (or
 2 parties) opposing the Class and would lead to repetitious trials of the numerous
 3 common questions of fact and law. Plaintiff knows of no difficulty that will be
 4 encountered in the management of this litigation that would preclude its maintenance
 5 as a class action. As a result, a class action is superior to other available methods for
 6 the fair and efficient adjudication of this controversy.

7 52. Plaintiff does not believe that any other Class member's interest in
 8 individually controlling a separate action is significant.

9 53. Plaintiff anticipates the issuance of notice, setting forth the subject and
 10 nature of the instant action, to the proposed Class members. Upon information and
 11 belief, Discover's own business records, other available records, and/or electronic
 12 media can be utilized for the contemplated notices. To the extent that any further
 13 notices may be required, Plaintiff anticipates the use of additional media and/or
 14 mailings.

15 54. Discover, the party that may potentially oppose class certification, has
 16 acted or refused to act on grounds generally applicable to the Class and California
 17 Subclass, thereby making appropriate final injunctive relief or corresponding
 18 declaratory relief.

19 **FIRST CAUSE OF ACTION**

20 **BREACH OF CONTRACT INCLUDING THE IMPLIED COVENANT**

21 **OF GOOD FAITH AND FAIR DEALING**

22 **(On behalf of Plaintiff and the Class)**

23 55. Plaintiff incorporates the preceding allegations by reference as if fully
 24 set forth herein.

25 56. Discover's contemporaneous published Interchange Rate Sheets
 26 constitute binding contractual obligations and promises to Plaintiff and the Class.

27 57. Discover breached the terms of its contracts with Plaintiff and the Class
 28 when it misclassified certain transactions into higher pricing tiers and

1 correspondingly applied and charged higher Interchange Rates and Interchange Fees
2 than provided in the contemporaneous Interchange Rate Sheets.

3 58. Plaintiff and the Class have performed all of the obligations on them
4 pursuant to the contracts.

5 59. Plaintiff and the Class have sustained monetary damages as a result of
6 Discover's breaches alleged herein, including in the form of overcharges and/or
7 reduced funds received in connection with transactions.

8 60. Discover's conduct alleged herein also breached the implied covenant
9 of good faith and fair dealing, which is incorporated into Plaintiff's and the Class'
10 contracts with Discover. Those contracts impose upon each party a duty of good
11 faith and fair dealing. Good faith and fair dealing, in connection with executing
12 contracts and discharging performance and other duties according to their terms,
13 means honoring the spirit – not merely the letter – of the bargain. Put differently, the
14 parties to a contract are mutually obligated to comply with the substance of their
15 contract in addition to its form. Evading the spirit of the bargain and abusing the
16 power to specify terms constitute examples of bad faith in the performance of
17 contracts.

18 61. Subterfuge and evasion violate the obligation of good faith in
19 performance even when an actor believes their conduct to be justified. Bad faith may
20 be overt or may consist of inaction, and fair dealing may require more than honesty.
21 Examples of bad faith are evasion of the spirit of the bargain, willful rendering of
22 imperfect performance, abuse of a power to specify terms, and interference with or
23 failure to cooperate in the other party's performance.

24 62. Discover breached the implied covenant of good faith and fair dealing
25 in its contracts with Plaintiff and the Class when it knowingly misclassified certain
26 transactions into higher pricing tiers and correspondingly overcharged Plaintiff and
27 the Class. Assuming *arguendo* that Discover had any contractual discretion to
28 classify transactions by card category (which assumption Plaintiff would dispute),

1 Discover abused any such discretion by systematically, knowingly, and in bad faith
2 classifying transactions into card categories at higher pricing tiers than they qualified
3 for and which were subject to substantially higher Interchange Rates and Interchange
4 Fees than were supposed to apply to the transactions in question.

5 63. Plaintiff, on behalf of itself and the Class, seeks damages for Discover's
6 breaches of contract alleged herein, in an amount to be proven at trial.

7 64. Plaintiff, on behalf of itself and the Class, seeks an order requiring
8 specific performance by Discover of its obligations under its Interchange Rate
9 Sheets.

10 **SECOND CAUSE OF ACTION**

11 **UNJUST ENRICHMENT**

12 **(On Behalf of Plaintiff and the Class)**

13 65. The preceding allegations are incorporated by reference and re-alleged
14 as if fully set forth herein.

15 66. To the extent required, this cause of action is pled in the alternative.

16 67. Discover's contemporaneous published Interchange Rate Sheets created
17 a quasi-contractual obligation by Discover to Plaintiff and the Class to assign and
18 charge Interchange Rates and Interchange Fees in accordance with the rates and
19 criteria specified therein.

20 68. As alleged herein, for Plaintiff and the Class, Discover assigned and
21 charged Interchange Rates and Interchange Fees to Discover card transactions that
22 were higher than those specified in Discover's contemporaneous Interchange Rate
23 Sheets.

24 69. As a result of the misconduct alleged above, Discover unjustly received
25 and retained millions of dollars in Interchange Fee overcharges assessed to Plaintiff
26 and the Class.

27 70. Plaintiff and the Class paid the Interchange Fee overcharges assessed by
28 and received by Discover (or had the amounts in question improperly withheld from

1 the proceeds they received on the transactions in question, which amounts Discover
 2 retained and received). Plaintiff and the Class have conferred a benefit on Discover
 3 that Discover does not deserve. Discover has knowledge of this benefit, as well as
 4 the wrongful circumstances under which it was conveyed, and yet has voluntarily
 5 accepted and retained the benefit conferred. Should it be allowed to retain such funds,
 6 Discover would be unjustly enriched.

7 71. Plaintiff and the Class lack an adequate remedy at law to recover the
 8 amounts sought in restitution by this claim: (a) to the extent Discover's Interchange
 9 Rate Sheets are deemed to not constitute or create a contractual obligation, or
 10 Discover's applying and charging Interchange Rates and Interchange Fees in excess
 11 of the rates/fees set forth in Discover's Interchange Rate Sheets are otherwise not
 12 deemed to constitute a basis for a breach of contract claim; (b) to the extent any or
 13 all of the amounts sought in restitution by this unjust enrichment claim are deemed
 14 not available under Plaintiff's breach of contract claim (e.g., if only a portion of the
 15 overcharges were deemed recoverable under such legal claim); and/or (c) to the
 16 extent the legal claim pled is deemed barred by any affirmative defense that would
 17 not apply to this unjust enrichment claim.

18 72. Plaintiff, on behalf of itself and the Class, seeks restitution from
 19 Discover of the Interchange Fee overcharges alleged herein.

20 **THIRD CAUSE OF ACTION**

21 **VIOLATION OF UNFAIR COMPETITION LAW, CAL. BUS. & PROF.**

22 **CODE §17200, ET SEQ.**

23 **(On Behalf of Plaintiff and the California Subclass)**

24 73. The preceding allegations are incorporated by reference and re-alleged
 25 as if fully set forth herein.

26 74. To the extent required, this cause of action is pled in the alternative.

27 75. Discover's conduct described herein violates the "unfair," "unlawful,"
 28 and "fraudulent" prongs of California's Unfair Competition Law (the "UCL"),

1 codified at California Business and Professions Code §§ 17200, *et seq.*

2 76. By its conduct alleged herein, Discover has violated the “unfair” prong
3 of the UCL, including without limitation by : (a) promising Plaintiff and the
4 California Subclass that certain Interchange Rates and Interchange Fees would apply
5 to particular categories of Discover card transactions, and then charging Plaintiff and
6 the California Subclass higher Interchange Rates and Interchange Fees than Discover
7 promised, pursuant to Discover’s misclassification scheme alleged herein; (b) hiding
8 and obfuscating its misclassification scheme from Plaintiff and the California
9 Subclass; and (c) failing to fix or provide retroactive remediation to Plaintiff and the
10 California Subclass for its misclassification and resulting overcharges despite having
11 knowledge of same for years.

12 77. Discover’s conduct alleged herein is immoral, unethical, oppressive,
13 unscrupulous, unconscionable, and substantially injurious to Plaintiff and the
14 California Subclass. By its conduct alleged herein, Discover has already improperly
15 extracted and retained for itself at least millions of dollars from merchants in
16 California alone. There is no utility to Discover’s alleged misconduct, and even if
17 there were any utility, it would be significantly outweighed by the gravity of the harm
18 caused by Discover’s conduct alleged herein.

19 78. Discover’s conduct alleged herein also violates California public policy,
20 including as such policy is reflected in Cal. Civ. Code § 1750, *et seq.*, Cal. Civ. Code
21 §§ 1709-1710, and California common law relating to contracts.

22 79. By its conduct alleged herein, Discover has also violated the “unlawful”
23 prong of the UCL, including by breaching contractual promises and/or violating the
24 implied covenant of good faith and fair dealing.

25 80. By its conduct alleged herein, Discover has also violated the
26 “fraudulent” prong of the UCL, including by misrepresenting that card transactions
27 by customers of Plaintiff and the California Subclass qualified for higher pricing tiers
28 than was the case, and by concealing and obfuscating its misclassification scheme

1 from Plaintiff and the California Subclass. Discover had unique, exclusive
2 knowledge of the facts that it misrepresented and concealed, and was under a duty to
3 tell the truth and to not hide, obfuscate, or misrepresent the truth.

4 81. By its conduct alleged herein, Discover received and retained money
5 from Plaintiff and the California Subclass that Discover should not have received and
6 retained, including Interchange Fee overcharges.

7 82. As a direct and proximate result of Discover's unfair, fraudulent, and
8 unlawful conduct alleged herein, Plaintiff and the California Subclass members lost
9 money and have lost other property and benefits in which Plaintiff and the California
10 Subclass have a vested interest.

11 83. Plaintiff and the California Subclass lack an adequate remedy at law to
12 recover the amounts sought in restitution by this claim: (a) to the extent Discover's
13 Interchange Rate Sheets are deemed to not constitute or create a contractual
14 obligation, or Discover's applying and charging Interchange Rates and Interchange
15 Fees in excess of the rates/fees set forth in Discover's Interchange Rate Sheets are
16 otherwise not deemed to constitute a basis for a breach of contract claim; (b) to the
17 extent any or all of the amounts sought in restitution by this UCL claim are deemed
18 not available under Plaintiff's breach of contract claim (e.g., if only a portion of the
19 overcharges were deemed recoverable under such legal claim); and/or (c) to the
20 extent the legal claim pled is deemed barred by any affirmative defense that would
21 not apply to this UCL claim. The UCL gives courts broad equitable power to "make
22 such orders or judgments...as may be necessary to restore to any person in interest
23 any money or property, real or personal, which may have been acquired by means of
24 such unfair competition." Cal. Bus. & Prof. Code § 17203.

25 84. Plaintiff and the California Subclass lack an adequate remedy at law to
26 obtain injunctive relief requiring Discover to stop its misclassification practice and
27 corresponding overcharges, to the extent the specific performance remedy for their
28 breach of contract claim is determined to require anything less than such relief. The

1 UCL gives courts broad equitable power to “make such orders or judgments...as may
2 be necessary to prevent the use or employment by any person of any practice which
3 constitutes unfair competition.” Cal. Bus. & Prof. Code § 17203.

4 85. Plaintiff seeks an order granting restitution to Plaintiff and the California
5 Subclass in an amount to be proven at trial, including for the Interchange Fee
6 overcharges that Plaintiff and the California Subclass have paid (or alternatively the
7 portions of the transaction amounts they have been deprived of that they should have
8 received) as a result of Discover’s violations alleged herein.

9 86. Discover’s conduct has caused substantial injury to Plaintiff and the
10 California Subclass, and on information and belief is ongoing. Plaintiff, on behalf of
11 itself and the California Subclass, seeks an order enjoining Discover from continuing
12 its misconduct alleged herein, ordering Discover to honor its promises and to charge
13 the appropriate applicable Interchange Rates and Interchange Fees to Plaintiff and
14 other merchants in California that accept Discover cards.

15 87. Plaintiff, on behalf of itself and the California Subclass, further seeks an
16 award of attorneys’ fees and costs under Cal. Code Civ. Proc. § 1021.5.

17 **PRAYER**

18 WHEREFORE, Plaintiff, on behalf of itself and the Class and California
19 Subclass, pray for judgment as follows:

20 1. For an order certifying this action as a class action, appointing Plaintiff’s
21 counsel as class counsel, and appointing Plaintiff as class representative;

22 2. For compensatory damages and restitution on all applicable claims and
23 in an amount to be proven at trial;

24 3. For an order requiring Discover to disgorge, restore, and return all
25 monies wrongfully obtained together with interest calculated at the maximum legal
26 rate;

27 4. For an order enjoining the wrongful conduct alleged herein;

28 5. For an order requiring specific performance by Discover of its

1 contractual obligations to Plaintiff and the Class;

2 6. For costs;

3 7. For pre-judgment and post-judgment interest as provided by law;

4 8. For attorneys' fees under the common fund doctrine, and all other
5 applicable law and sources; and,

6 9. For such other relief as the Court deems just and proper.

7 **DEMAND FOR JURY TRIAL**

8 Plaintiff, on behalf of itself and the Class and California Subclass, demand a
9 trial by jury on all issues so triable.

10
11 Dated: August 14, 2023

Respectfully submitted,

12 /s/ Taras Kick

13
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